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No. 1006

# In the Supreme Court of the United States

OCTOBER TERM, 1965

AARON BAILEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

THURGOOD MARSHALL,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C., 20530.*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

This is an action under the Federal Tort Claims Act to recover $29,000 in damages. Petitioner grazed his cattle within the Redstone Arsenal Military Reservation on land which he had leased from the government. He alleged that the government negligently allowed "poison or poisonous water" to flow into a drainage ditch constructed on a portion of the grazing land. Some of his cattle died or became ill, petitioner claimed, as a result of drinking water from the ditch (R. 9, 10–11).[1] The district court granted summary judgment for the government because the

[1] "R" refers to the mimeographed record in the court of appeals.



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exculpatory-and-hold-harmless clause in the lease precluded petitioner's recovery (Pet. App. A1).[2] The court of appeals affirmed *per curiam* (Pet. App. A3), relying on *United States* v. *Starks,* 239 F. 2d 544 (C.A. 7), which reached the same conclusion on almost identical facts.

Petitioner seeks further review on the ground that the decision of the court of appeals misinterpreted the lease provision and is in conflict with *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.,* 372 U.S. 697. The plain language of the lease encompasses the present situation, and there is no occasion to examine the uniform determinations of the two courts below and the Seventh Circuit. *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co., supra,* is one of a series of cases which hold void as against public policy contract clauses exculpating towboats from negligence. See, also, *Bisso* v. *Inland Waterways Corp.,* 349 U.S. 85, and *Boston Metals Co.* v. *Winding Gulf,* 349 U.S. 122. Those decisions rest

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[2] The clause provides (R. 14):

> *That the United States* or its contractors or any of their officers, agents, or employees *shall not be responsible*, except as otherwise provided in Condition No. 5 hereof, for any loss, expense, damages to property, or injuries to persons, which may arise from or be incident to the use and occupation of the said premises, or *for damages to the property of the lessee*, or for injuries to the person of the lessee's officers, agents, servants, or employees, or others who may be on said premises at their invitation or the invitation of any one of them, *arising from activities of the United States or its contractors, and the lessee shall hold the United States and its contractors, harmless from any and all such claims.* [Emphasis supplied.]

on the special bargaining position of common carriers and prevent overreaching through "monopolistic compulsions." *Bisso* v. *Inland Waterways Corp., supra,* at 91. That theory does not apply here since the government had no unusual bargaining power; it was merely in the same position as any other lessor of land. Petitioner, moreover, knew that the land was situated within the bounds of a military arsenal. He was aware, or should have been aware, of the conditions existing on the premises, the possibility of injury to his property, and the exculpatory provision in the lease.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
*Solicitor General.*

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